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Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context

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Notes

Conscious Parallelism: The Business Judgment Defense in a Summary Judgment Context

The Sherman Act's prohibition of conspiracy in restraint of trade[1] has posed the perennial problem of distinguishing between independent action and anticompetitive agreement. The difficulty of this task is accentuated when plaintiffs' evidence of "consciously parallel"[2] business behavior, offered to prove conspiracy, is met by business justifications for parallel conduct presented in defendants' summary judgment motions. This Note begins by discussing the basic principles of Sherman Act conspiracy and inferential proof of concerted action in a summary judgment context. The Note addresses the various standards governing the doctrine of conscious parallelism, then focuses on the development, application, and limitation of the business judgment defense to conspiratorial inferences drawn from conscious parallelism. The Note contrasts the Third and Fifth Circuits' approaches to evaluating conscious parallelism and accompanying business justifications in summary judgment motions. The Note concludes that the Fifth Circuit's limitation of the business judgment defense undermines the purposes of the Sherman Act and is inconsistent with Supreme Court precedent. In contrast, the Third Circuit's formulation both recognizes the importance of business justifications in determining antitrust liability and preserves the trial judge's latitude in assessing the business context of the suspect conduct. The Note recommends that courts uniformly adopt the Third Circuit analysis.

The Fundamentals of Sherman Act Conspiracy

Congress enacted several major provisions of the Sherman Act to deal with anticompetitive conduct involving multiple parties.[3] Section

1. 15 U.S.C. § 1 (1982). *See infra* text accompanying note 4.

2. The term "conscious parallelism" refers to the "common practice among firms in a concentrated industry of conducting their similar businesses in a uniform manner, aware that their counterparts are pursuing the same course of action." Note, *Conscious Parallelism and the Sherman Act: An Analysis and a Proposal*, 30 VAND. L. REV. 1227, 1228 (1977). *See generally id.* at 1228-37. For a detailed economic analysis of conscious parallelism, see R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 39-77 (1976).

3. *See generally* Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743, 744-48 (1950).

1 of the Act provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal."[4] It is axiomatic that unilateral conduct by a solitary entity cannot violate section 1.[5] This same principle applies to a claim arising from that part of section 2 of the Sherman Act that proscribes "a combination or conspiracy to monopolize."[6] Thus, when several parties are accused of anticompetitive activity, a prima facie case under either section requires proof that the defendants engaged in concerted action.[7]

Anticompetitive agreement is the gravamen of a Sherman Act conspiracy complaint.[8] As the United States Supreme Court noted in *American Tobacco v. United States*,[9] proof of conspiracy is established by demonstrating "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement."[10] This ostensibly straight-forward definition of agreement has become increasingly difficult to apply in an era of shifting commercial relationships and increasing business sophistication.[11] In recent years, parallel refusals to deal, particularly in the course of motion picture distribution, have posed especially vexing problems for the courts.[12] The Sherman Act itself was drafted with simpler economic scenarios in mind.[13] With the scope of the Act so heavily dependent on the definition of the

4. 15 U.S.C. § 1 (1982).

5. United States v. Colgate, 250 U.S. 300, 307 (1919); Sierra Wine & Liquor Co. v. Heublein, Inc., 626 F.2d 129, 132 (9th Cir. 1980); Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 286 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979).

6. 15 U.S.C. § 2 (1982). Section 2 of the Act is primarily directed at single-firm monopolistic conduct though it encompasses both joint and individual action. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 655 (1962).

7. Granddad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105, 1111-12 (9th Cir. 1979), *cert. denied*, 449 U.S. 1676 (1981). Certain claims under § 7 of the Clayton Act, the Robinson-Patman Act, and the Wilson Tariff Act may also require proof of concerted action. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1165 (E.D. Pa. 1981).

8. Theatre Enter. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

9. 328 U.S. 781 (1946).

10. *Id.* at 810.

11. *See* Turner, *supra* note 6, at 656.

12. *See infra* notes 51, 74-79, 100-06 & accompanying text.

13. *See* Rahl, *supra* note 3, at 744-48; Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 93-101 (1982). *Cf.* Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 662-63 (1982) ("The antitrust laws were written with awareness of the diversity of business conduct and with the knowledge that detailed statutes which would prohibit socially undesirable conduct would lack the flexibility needed to encourage . . . desirable conduct.").

term "agreement," the judiciary has assumed the onerous burden of characterizing different forms of business conduct with virtually identical economic consequences as either independent or concerted action.[14]

Inferential Proof of Conspiracy in a Summary Judgment Context

The combination or conspiracy essential to a Sherman Act violation may be established either directly or circumstantially.[15] Plaintiffs rarely have the luxury of relying on an overt agreement to restrain trade or fix prices as a basis of their proof.[16] Consequently, circumstantial evidence is the foundation of most Sherman Act conspiracy cases. The task of inferring the ultimate fact of conspiracy from frequently ambiguous circumstances affords judges considerable discretion in defendants' summary judgment motions.

General Principles

Under rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[17] If an antitrust defendant moving for summary judgment presents a valid justification for parallel conduct, the burden shifts to the plaintiff opposing the motion to produce "specific factual support" for the conspiracy claim.[18]

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14. *See* Turner, *supra* note 6, at 656.

15. *See* Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700, 703-04 (1969); American Tobacco v. United States, 328 U.S. 781, 809-10 (1946).

16. *See* General Chem., Inc. v. Exxon Chem. Co., 625 F.2d 1231, 1233 (5th Cir. 1980).

17. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

Subsection (c) particularizes a bifurcated standard that the party opposing summary judgment must meet to defeat the motion. Hahn v. Sargent, 523 F.2d 461, 469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). *But see* First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 288-89 (1967) (adverse party need show only sufficient evidence of a dispute to require resolution by judge or jury). When the moving party has met its burden under rule 56(c), the adverse party must then establish the existence of a fact that is both "genuine" and "material." Hahn v. Sargent, 523 F.2d at 464. *But see* First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. at 288-89 (conclusive proof not required). A material issue affects the outcome of the litigation, Hahn v. Sargent, 523 F.2d at 464; a genuine issue exists where there is a substantial dispute that requires resolution by a judge or jury, First Nat'l Bank v. Cities Serv. Co., 391 U.S. at 289.

18. Program Eng'g v. Triangle Publications, 634 F.2d 1188, 1195 (9th Cir. 1980). *See also* Modern Home Inst. Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 110-11 (2d Cir. 1975).

The application of rule 56 to antitrust cases is a source of continuing controversy.[19] In *Poller v. Columbia Broadcasting System*,[20] the Supreme Court stated that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."[21] The circumspect language of the *Poller* Court has been qualified by a later opinion in *First National Bank v. Cities Service Co.*[22] In upholding the summary judgment for defendant Cities Service Company, the Court stated:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.[23]

In *Cities Service*, the Court interpreted rule 56(e)[24] to prevent the plaintiff from relying on bare allegations in the complaint "coupled with the hope that something could be developed at trial to support those allegations."[25] In order to present the issue of conspiracy to the jury, the plaintiff must produce significant probative evidence from which a trier of fact could find illegal concerted action on the basis of reasonable inference rather than speculation.[26] A complete failure to produce evidence indicating a conspiratorial agreement beyond mere parallel conduct is the clearest example of legal insufficiency that justifies summary judgment.[27]

Courts following *Cities Service* have often granted summary judgment in favor of antitrust defendants.[28] Disputes concerning the sub-

19. *See generally* Rogers, *Summary Judgment in Antitrust Conspiracy Litigation*, 10 LOY. U. CHI. L.J. 667 (1979).

20. 368 U.S. 464 (1962).

21. *Id.* at 473. "Where there has been no opportunity for discovery or it has yet to be undertaken or is incomplete, the courts have applied this [*Poller*] policy to prohibit altogether summary judgment on the merits in antitrust litigation . . . ." Willmar Poultry Co. v. Morton-Norwich Prod., Inc., 520 F.2d 289, 293 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976).

22. 391 U.S. 253 (1967).

23. *Id.* at 290.

24. FED. R. CIV. P. 56(e) provides, in pertinent part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

25. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 290 (1967).

26. *See infra* note 32 & accompanying text.

27. *See infra* notes 52-54 & accompanying text.

28. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1140 n.53 (E.D. Pa. 1981) (citing numerous cases).

jective elements of an antitrust conspiracy, such as state of mind, are not sufficient to defeat a summary judgment motion in the absence of significant probative evidence supporting an inference of a defendant's conscious commitment to a conspiratorial scheme.[29]

The probative nature of circumstantial evidence is ascertained by applying various principles governing the permissibility of factual inferences.[30] The ultimate task of evaluating the plausibility of competing inferences rests with the trier of fact.[31] A trier of fact may only draw those inferences that are reasonably susceptible from the evidence;[32] it may not speculate.[33] In a summary judgment situation, the court must consider every reasonable inference from underlying facts in favor of the party opposing the motion.[34] Thus, a court's treatment of inferences is critical to the resolution of a summary judgment motion in a case relying on circumstantial evidence.

Policy Considerations

Summary judgment presents an inherent conflict between the constitutional right to trial by jury and the pragmatic concern for a swift resolution of specious litigation.[35] While there is considerable support for greater use of summary adjudication in antitrust cases, the complex legal and factual nature of these cases has made many judges extremely reluctant to grant summary judgment motions.[36] Nevertheless, the na-

29. *Id.* at 1170.

30. *Id.* "Establishing conspiracy as a permissible inference, like any empirical inquiry, is merely an exercise in inductive reasoning—inference based upon the cumulation of consistent data." Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

The principles governing the permissibility of inferences apply equally to motions for summary judgment, motions for directed verdict, or any other situation in which a party seeks to meet his or her evidentiary burden by means of inference. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1171 (E.D. Pa. 1981).

31. *See* Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 116 (3d. Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

32. British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). *See* Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir. 1978); Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 531 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir.), *cert. denied*, 423 U.S. 987 (1975).

33. A mere scintilla of evidence supporting the alleged factual dispute will not suffice to avert summary judgment, because speculation will impermissibly result. British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979).

34. *See* United States v. Diebold Inc., 369 U.S. 654, 655 (1962); American Tel. & Tel. Co. v. Delta Communications Corp., 590 F.2d 100, 101-02 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979). As the Supreme Court has stated, "the essential requirement is that mere speculation not be allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked." Galloway v. United States, 319 U.S. 372, 395 (1943).

35. *See* Rogers, *supra* note 19, at 688-89.

36. Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978), *cert.*

ture of antitrust litigation encourages summary disposition.[37] The National Commission for the Review of Antitrust Laws and Procedures reported that "[o]n average, antitrust cases take longer to litigate than other civil litigation; that some antitrust cases absorb enormous resources and time; and that undue delay is a serious problem in a significant number of complex antitrust cases."[38] The statutory remedy of treble damages for private antitrust plaintiffs also "creates a special temptation for the institution of vexatious litigation."[39] Plaintiffs, having suffered injury caused by normal business practices, may seek recovery without sufficient factual basis by casting their complaint in antitrust terms.[40] Moreover, Sherman Act cases tend to be especially difficult for jury consideration.[41] As Chief Justice Burger aptly noted, "it borders on cruelty to draft people to sit for long periods to cope with issues largely beyond their grasp."[42]

A court's summary judgment approach assumes special significance when the plaintiff's case is predicated upon circumstantial evidence. By preventing such a case from going to a jury, a judge protects neutral principles of law from powerful forces outside the scope of the law, including compassion and prejudice.[43] A judge might also engage in undesirable speculation when weighing the inferences of conspiracy and of independent action[44] on a summary judgment motion. On balance, however, it would appear that the danger inherent in the former

denied, 440 U.S. 982 (1979). *See Report of the National Commission for the Review of Antitrust Laws and Procedures*, 80 F.R.D. 509, 565 (1979).

37. Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1166-67 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

38. *Report of the National Commission for the Review of Antitrust Laws and Procedures*, *supra* note 36, at 521. "1977 figures of the Administrative Office of the United States Courts showed that, for private antitrust cases reaching trial, the median time between filing and disposition was 44 months and that 10 percent of these cases took longer than 68 months (5.67 years)." *Id.* at 525.

39. Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 478 (1962) (Harlan, J., dissenting).

40. Blair Foods , Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 672 (9th Cir. 1980).

41. *See* United States v. United Gypsum Co., 438 U.S. 422, 465-69 (1978); Weit v. Continental Ill. Nat'l Bank & Trust Co., 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

42. Weit v. Continental Ill. Nat'l Bank & Trust Co., 641 F.2d 457, 464 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (quoting remarks of the Chief Justice of the United States, Meeting of the Conference of Federal Chief District Judges, Flagstaff, Ariz., Aug. 7, 1979).

43. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

44. The plaintiff cannot carry his or her burden of proof by a preponderence of the evidence when "two or three explanations are equally likely reconstructions of the defendants' behavior, there is not a whit of evidence for preferring one explanation over the others, and only one is sinister . . . . A jury needs to be able to premise its verdict on more than conjecture." Nye, *Can Conduct-Oriented Enforcement Inhibit Conscious Parallelism?*, 44 ANTITRUST L.J. 206, 222 (1975).

situation is greater than that in the latter—especially in view of the complex and potentially vexatious nature of antitrust litigation.

The Doctrine of Conscious Parallelism

Origins

The doctrine of conscious parallelism[45] initially emerged in a series of private suits involving the motion picture industry brought under section 1 of the Sherman Act. In *Interstate Circuit, Inc. v. United States*,[46] individual members of a group of motion picture distributors, at the request of two large first-run exhibitors, simultaneously imposed identical restrictions on subsequent showings of the films that they distributed.[47] There was no direct evidence of an agreement to impose the same restrictions, but it was demonstrated that each distributor knew that all the other distributors had been approached with the same proposal and that the imposition of the restriction would be feasible only if adhered to by all the distributors.[48] Additionally, the plaintiff demonstrated that the identical action taken by the distributors had created a likelihood of increased profits for each distributor.[49] The Supreme Court ruled that these facts permitted an inference of a tacit agreement between the distributors.[50] Subsequent lower court decisions relied on *Interstate Circuit* to infer conspiracies from uniform refusals to deal or other parallel business activity.[51]

The Supreme Court limited the use of parallel business activity to infer conspiracy in *Theatre Enterprises v. Paramount Film Distributing Corp.*[52] The Court held that parallel business behavior is admissible circumstantial evidence of conspiracy but does not "conclusively" demonstrate an illegal agreement.[53]

As a matter of logic and precedent, conscious parallelism is "neutral" evidence insufficient to support an inference of conspiracy in opposition to a summary judgment motion.[54] As Professor Turner states:

> Conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts.

45. *See supra* note 2.
46. 306 U.S. 208 (1939).
47. *Id.* at 214-19.
48. *Id.* at 222.
49. *Id.*
50. *Id.* at 227.
51. *See, e.g.,* William Goldman Theatres Inc. v. Loew's Inc., 150 F.2d 738 (3d Cir. 1945); Milgram v. Loew's Inc., 94 F. Supp. 416 (E.D. Pa. 1950), *aff'd*, 192 F.2d 579 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952).
52. 346 U.S. 537 (1954).
53. *Id.* at 540-41. *See infra* notes 74-79 & accompanying text.
54. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1172 (E.D. Pa. 1981).

> Thus, conscious parallelism is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*, that the decisions were consistent with the individual self-interest of those concerned only if they all decided the same way.[55]

Thus, interdependent decision-making creates a reasonable expectation that conduct would have been dissimilar if truly independent decisions had been made.[56]

Evaluating Parallel Business Behavior: The Third Circuit Approach and Its Progeny

Lower courts have attempted to develop a coherent framework for evaluating the probative significance of conscious parallelism in the summary judgment context. In *Bogosian v. Gulf Oil Corp.*,[57] Chief Judge Seitz of the Third Circuit articulated a novel approach to this problem:

> The law is settled that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless circumstances under which it occurred make the inference of rational independent choice less attractive than that of concerted action.[58]

Under this formulation, if it is equally possible to draw the inference of rational independent choice and the inference of concerted action, then the offered proof is insufficient to defeat a summary judgment motion.[59] Thus, Chief Judge Seitz's approach uses a probability method: the inference of conspiracy must be more probable than the inference of independent action in order for the inference of conspiracy to be permissible.

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55. Turner, *supra* note 6, at 658 (emphasis in original). *But see* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1575-78 (1969) (tacit collusion by oligopolist violates § 1).

56. Turner, *supra* note 6, at 659.

57. 561 F.2d 434 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The court of appeals vacated and remanded the district court's grant of pre-discovery summary judgment for the defendants on a complaint which alleged "a course of interdependent consciously parallel action." *Id.* at 439. The Third Circuit determined that the lower court had treated the summary judgment motion as the functional equivalent of a rule 12(b)(6) motion to dismiss for failure to state a claim, and reviewed the lower court's order on the standard applicable to a motion to dismiss. *Id.* at 444. The court of appeals determined that the complaint was sufficient to state a cause of action under § 1 of the Sherman Act. *Id.* at 445.

58. *Id.* at 446 (comparing Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), with First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 274-88 (1968)). *Accord* Ambrook Enter. v. Time Inc., 612 F.2d 604, 615 (2d Cir. 1979); Consolidated Farmers Mut. Ins. v. Anchor Sav. Ass'n, 480 F. Supp. 640, 649-50 (D. Kan. 1979).

59. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1174 (E.D. Pa. 1981). *But see* Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324-26 (11th Cir. 1982) (rejects "rule of equally probable inferences" in a wrongful death case).

In a prior case, *Venzie Corp. v. United States Mineral Products Co.*,[60] Chief Judge Seitz had specified two particular circumstances that generally have been accepted[61] as critical to a determination of conspiracy based upon parallel conduct: 1) a showing of acts by defendants in contradiction of their own economic interests, and 2) satisfactory demonstration of a motivation to enter an agreement.[62] The absence of activity detrimental to economic self-interest "renders consciously parallel business behavior 'meaningless and in no way indicates agreement.' "[63] A motive to conspire against the plaintiff is also critical because, in the absence of a demonstration of a benefit derived from an anticompetitive agreement, the requisite inference of conspiracy does not necessarily follow from a mere coincidence of conduct.[64] Reading *Bogosian* and *Venzie Corp.* together, it appears that the presence of both uneconomical behavior and motive to conspire lead to the conclusion that the inference of conspiracy is more probable than the inference of independent action.

Other circuits have embraced a more limited construct, requiring only the first of Judge Seitz's two prongs. The Eighth Circuit, in *Admiral Theatre Corp. v. Douglas Theatre Co.*,[65] held that "[o]nly where the pattern of action undertaken is inconsistent with the self-interest of the individual actors, were they acting alone, may an agreement be inferred solely from . . . parallel action."[66]

The Ninth Circuit recently took an intermediate position, ruling that consciously parallel behavior may be probative of conspiracy if the parallel acts "were against each conspirator's self-interest, that is, that the decision to act was not based on a good faith business judgment."[67]

60. 521 F.2d 1309 (3d Cir. 1975). Plaintiffs, a group of fireproofing contractors, brought an action against a competitor and against a manufacturer of non-asbestos fireproofing spray alleging violations of § 1 of the Sherman Act. The circuit court upheld an order granting defendant's motion for judgment n.o.v. on plaintiffs' claim of a concerted refusal to deal. *Id.* at 1318.

61. *Id.* at 1314. *See, e.g.,* Consolidated Farmers Mut. Ins. v. Anchor Sav. Ass'n, 480 F. Supp. 640, 649-50 (D. Kan. 1979). *See infra* note 71 & accompanying text.

62. Venzie Corp. v. United States Mineral Prod. Co., 521 F.2d at 1314 (citing First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 287 (1968), and Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962)).

63. *Id.* (citing Turner, *supra* note 6, at 681).

64. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 287 (1968); Venzie Corp. v. United States Mineral Prod. Co., 521 F.2d at 1315.

65. 585 F.2d 877 (8th Cir. 1978).

66. *Id.* at 884. *See also* Proctor v. State Farm Mut. Auto. Ins. Co., 675 F.2d 308, 327 (D.C. Cir. 1982); Modern Home Inst. Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 111 (2d Cir. 1975).

67. Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 884 (9th Cir. 1982). *See also* Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981).

The Ninth Circuit, however, qualified its approach by indicating that a showing of a plausible motive for the defendants to particpate in a conspiracy may sometimes be required.[68]

The common denominator of these three approaches to determining the probative value of conscious parallelism is a reliance on "plus factors"[69]— factors beyond the fact of the defendants' uniform conduct. "Plus factors" are independent items of evidence that, when coupled with evidence of conscious parallelism, tend to support a finding of collusive agreement.[70] The precise quality and quantity of the "plus factors" necessary to infer conspiracy are generally determined on a case-by-case basis.[71] Once the plaintiff has met the initial burden of presenting circumstances that suggest interdependence, the summary judgment inquiry focuses on the defendant's attempt to show business justifications for consciously parallel action.[72]

The Business Judgment Defense

In the absence of monopolistic or conspiratorial conduct, the Sherman Act does not restrict independent business judgment. Accordingly, a trader or manufacturer engaged in an entirely private enterprise is free to exercise his or her independent discretion as to the parties with whom he or she deals.[73] Thus, the extent to which a court considers the context of business conduct and any business justification for conscious parallelism apparent from that conduct may, in many cases, significantly influence the prophylactic function of summary judgment.

Evolution of the Business Judgment Defense

The Supreme Court's decision in *Theatre Enterprises v. Paramount Film Distributing Corp.*[74] limiting the conscious parallelism doctrine represents the initial step in the evolution of the business judgment defense. In *Theatre Enterprises*, the operator of a suburban movie house alleged a conspiracy to restrict first-run motion pictures to downtown

68. *See* Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 885 (9th Cir. 1982).

69. The first reported usage of the term "plus factor" in an antitrust context occurred in C-O-Two Fire Equip. Co. v. United States, 197 F.2d 489, 493 (9th Cir.), *cert. denied*, 344 U.S. 892 (1952). *See generally* Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 885-87 (1975).

70. Montana v. Superamerica, 559 F. Supp. 298, 302 (D. Mont. 1983).

71. *See* P. AREEDA, ANTITRUST ANALYSIS 371-82 (1981).

72. *See supra* notes 58-67 & accompanying text.

73. United States v. Colgate, 250 U.S. 300, 307 (1919); American Tel. & Tel. Co. v. Delta Communication Corp., 590 F.2d 100, 102 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979); Anaya v. Las Cruces Sun News, 455 F.2d 670, 672 (10th Cir. 1972).

74. 346 U.S. 537 (1954).

theatres. The suburban exhibitor contended that because all of the defendant movie distributors had refused to provide him with first-run motion pictures he was entitled to a directed verdict as a matter of law. The defendants offered substantial evidence explaining the reasons that led the industry to confine the exclusive showing of first-run pictures to downtown theatres.[75] At trial, the jury decided for the defendants and the district court's judgment entered on the verdict was affirmed by the Fourth Circuit Court of Appeals.[76] The Fourth Circuit and the Supreme Court agreed that there was evidence to support both an inference of conspiracy and an inference of independent business judgment.[77] Thus, an issue was presented that required submission to the jury for resolution. Despite the limited precedential value of this decision,[78] the Supreme Court recognized for the first time that evidence of business justification can be utilized to counter inferences of conspiracy drawn from parallel conduct.[79]

A more troublesome situation emerges when allegations of "plus factors" are countered by evidence of business justification. Some courts have held that rule 56(e) mandates that plaintiffs rebut defendants' evidence of business justifications with a counter offer of evidence raising a material factual issue.[80] Specifically, plaintiffs must respond

75. The various respondents advanced much the same reasons for denying petitioner's offers. Among other reasons they asserted that day-and-date first-runs are normally granted only to noncompeting theatres. Since the Crest is in "substantial competition" with the downtown theatres, a day-and-date arrangement would be economically unfeasible . . . . [A]n exclusive license would be economically unsound because the Crest is a suburban theatre, located in a small shopping center, and served by limited public transportation facilities; and, with a drawing area of less than one-tenth that of a downtown theatre, it cannot compare with those easily accessible theatres in the power to draw patrons. Hence the downtown theatres offer far greater opportunities for the widespread advertisement and exploitation of newly released features, which is thought necessary to maximize the overall return from subsequent runs as well as first-runs.

Id. at 540.

76. 201 F.2d 306 (4th Cir. 1953).

77. Theatre Enter. v. Paramount Film Distrib. Corp., 346 U.S. at 542; Theatre Enter. v. Paramount Film Distrib. Corp., 201 F.2d at 313.

78. *See* Nye, *supra* note 44, at 208. "[T]he Supreme Court reserve[d] judgment on the issue of whether and when evidence of mere conscious parallelism will support an inference of conspiracy . . . ." *Id.* at 207.

79. Some circuit court decisions after *Theatre Enterprises* used business justifications to neutralize a bare allegation of conscious parallelism. Once parallel conduct is shown to be consistent with independent competitive decisions, additional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement to boycott. *See, e.g.,* Independent Iron Works, Inc. v. United States Steel Corp., 322 F.2d 656, 665 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963).

80. *See, e.g.,* Program Eng'g v. Triangle Publications, 634 F.2d 1188, 1195 (9th Cir. 1980); Aviation Specialties v. United Technologies Corp., 568 F.2d 1186, 1192 (5th Cir. 1976).

to a summary judgment motion with an explanation reconciling facts that suggest a good faith business judgment with the existence of an alleged conspiracy.[81] Thus, a reasonable business judgment defense presented in a summary judgment motion, uncontradicted by any evidence of "plus factors," may be sufficient to dismiss an underdeveloped interdependence theory in the complaint.

The Supreme Court's opinion in *First National Bank v. Cities Service Co.*[82] provides a detailed discussion of the business judgment defense in the context of a summary judgment motion. In *Cities Service*, the plaintiff unsuccessfully attempted to sell Iranian oil to several major oil companies. He asserted that these efforts were thwarted by a global conspiracy to boycott Iranian oil in response to Iran's nationalization of certain foreign industrial assets. The plaintiff suggested that Cities Service Company's abrupt decision not to puchase Iranian oil after extensive negotiations, coupled with the attractiveness of the plaintiff's offer, demonstrated participation in an illegal conspiracy. Faced with the issue of Cities Service Company's summary judgment motion, the Supreme Court reasoned that these facts standing alone might well be sufficient to require the jury to determine that the defendant's decision not to deal with the plaintiff was the product of such a conspiracy.[83] However, the Court held that summary judgment was still proper in light of the overwhelming contrary evidence of benign motives "involving the exercise of business judgment."[84] Implicit in this holding is the conclusion that the the defendant's business judgment defense was more persuasive than the plaintiff's evidence of "plus factors." Thus, the business judgment defense mandated the conclusion that defendants engaged in independent activity.

Today, the *Cities Service* approach provides the primary analytical framework for the use of the business judgment defense.[85] Summary judgment for defendants has been granted in numerous cases in which the inference of conspiracy to be drawn from conscious parallelism was superseded by an opposing inference of independent action.[86] The defendants' alleged retaliatory motivation for a group boycott in *Cities Service* was overwhelmed by a variety of legitimate business conse-

81. *See* Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017, 1027 n.27 (5th Cir. 1983); Modern Home Inst. Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 111 (2d Cir. 1975).

82. 391 U.S. 253 (1967).

83. *Id.* at 277.

84. *Id.*

85. *See generally* Rogers, *supra* note 19.

86. *See, e.g.,* Modern Home Inst. Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 111 (2d Cir. 1975); American Structures, Inc. v. Fidelity & Deposit Co., 545 F. Supp. 1021, 1027-28 (E.D. Pa. 1982); *see also* Rogers, *supra* note 19, at 671-78.

quences sufficient to deter the purchase of the plaintiff's Iranian oil.[87] Understandably, lower courts relying on *Cities Service* have tended to grant summary judgment only when they consider the business judgment defense overwhelming.[88]

The Third Circuit Approach

The business judgment defense is an integral component of Chief Judge Seitz's formula for determining the probative value of conscious parallelism, and, hence, determining which inference—of conspiracy or of independent action—will prevail in Third Circuit cases.[89] In *Tose v. First Pennsylvania Bank*,[90] the plaintiff, the owner of a controlling partnership interest in a professional football club, alleged a violation of section 1 of the Sherman Act arising from a conspiracy by the defendant banks to refuse to grant him a profitable loan. In support of their summary judgment motion, the defendants presented an array of business reasons for their uniform refusal to loan the funds, including unresolved legal obstacles to the loan and the plaintiff's unfavorable reputation.[91] In upholding summary judgment for the defendants, the Third Circuit weighed these business justifications and the "inherent improbability of an agreement to refuse profitable business for noneconomic reasons"[92] against the plaintiff's evidence of a motivation to enter into an agreement. The court concluded that the plaintiff's evidence was clearly insufficient.[93] Thus, under the Third Circuit approach, a judge weighs business justifications for parallel conduct against the plaintiff's evidence of "plus factors" in determining whether the evidence of "plus factors" is sufficient to allow an inference of conspiracy. If a defendant can overcome plaintiff's showing of "plus factors" by demonstrating that the defendant was motivated by an independent business decision and not an unlawful agreement, then summary judgment should be granted.[94]

87. First Nat'l Bank v. Cities Serv. Co., 391 U.S. at 280.

88. *See, e.g.,* Solinger v. A & M Records, Inc., 538 F. Supp. 402, 409 (N.D. Cal. 1982); Consolidated Farmers Mut. Ins. v. Anchor Sav. Ass'n, 480 F. Supp. 640, 645-46 (D. Kan. 1979); *see also* Rogers, *supra* note 19, at 671-78.

89. *See supra* notes 57-62 & accompanying text.

90. 648 F.2d 879 (3d Cir.), *cert. denied*, 454 U.S. 893 (1981).

91. *Id.* at 889.

92. *Id.* at 895.

93. *Id.*

94. *See supra* note 44; Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 114 (3d Cir. 1980) (upholding the grant of a directed verdict); American Structures, Inc. v. Fidelity & Deposit Co., 545 F. Supp. 1021, 1027-28 (E.D. Pa. 1982); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1176 (E.D. Pa. 1981). *Cf.* Weit v. Continental Ill. Nat'l Bank & Trust Co., 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (in a price-fixing case, "when the plaintiff or prosecution relies on circumstantial evidence

Fifth Circuit Limitation

The Fifth Circuit is apparently the only circuit that expressly limits the use of the Third Circuit's probability method[95] for determining the probative value of conscious parallelism in the summary judgment context. Theoretically, a court, in passing on a motion for summary judgment, must indulge every reasonable inference from established facts in favor of the party opposing the motion.[96] This raises the question of how the reasonableness of an inference should be evaluated. The Fifth Circuit, in *American Telephone & Telegraph Co. v. Delta Communications Corp.*,[97] ruled:

> Insofar as any weighing of inferences from given facts is permissible, the task of the court is not to weigh these against each other but rather to cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness, casting aside those which do not meet it and focusing solely on those which do.[98]

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alone, the inference of unlawful agreement rather than individual business judgment must be the compelling, if not exclusive, rational inference").

95. *See supra* notes 58-59 & accompanying text.

96. *See supra* note 34 & accompanying text.

97. 590 F.2d 100 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979). Delta alleged two major conspiracies that unreasonably restrained its entrance into the television market: 1) the defendants, including the major networks and AT&T, collectively conspired to prevent plaintiff and other UHF stations from receiving fair remuneration from the television networks for the service of delivering their signal, and 2) defendants conspired to establish, maintain and apply AT&T tariffs for the delivery of network signals which discriminated against Delta and other UHF stations. 408 F. Supp. 1075, 1087 (S.D. Miss. 1976). The district court rejected Delta's assertions of consciously parallel refusals to deal. "Delta's claim fail[ed] to meet the *Cities Service* summary judgment test in that the mass of discovery developed in this case clearly points to the much more plausible inference that the network dealings with Delta grew not from any conspiratorial plan but from independent business decisions which concurred in no more than the separate conclusions that Delta was unable to deliver a sufficient television audience to make more favorable dealings with Delta economically sound . . . . Delta . . . failed to develop facts from which the most probable inference to be drawn was conspiracy." *Id.* at 1087. The Fifth Circuit affirmed. 579 F.2d 972 (5th Cir. 1978).

On petition for rehearing en banc, Delta argued that the court of appeals erred in allowing the trial court to weigh inferences from the facts established and adopt the more probable inference in support of summary judgment. 590 F.2d 100, 101 (5th Cir. 1979).

98. American Tel. & Tel. Co. v. Delta Communications Corp., 590 F.2d at 101-02. The Fifth Circuit denied the petition for rehearing en banc despite language throughout the trial court opinion indicating the use of a "probability" approach to assessing inferences from conscious parallelism. The court of appeals focused on isolated district court language which suggested that no inference of conspiracy would be reasonable from facts that show no more than a failure to conclude an unattractive bargain. *Id.* at 102. The court, after reviewing the defendant's economic justifications for refusing to deal, concluded: "We do not believe, in the face of such facts, that an inference of anticompetitive conspiracy is reasonable . . . . [I]n each instance complained of, the proper rule as set out above has been applied." *Id.* *See* Hill Aircraft & Leasing Corp. v. Fulton County, 561 F. Supp. 667, 677 (N.D. Ga. 1982); Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1261 (W.D. La. 1982).

This decision creates a conceptual distinction between weighing inferences against each other and weighing them against an abstract reasonableness standard. This distinction is difficult to make when evidence supporting an inference of conspiracy is countered by business justifications for parallel conduct. Often, the reasonableness of a conspiratorial inference from parallel conduct is dependent upon the strength of defendant's business justifications.

The Fifth Circuit's opinion in *Southway Theatres v. Georgia Theatre Co.*[99] represents a more recent application of the *American Telephone & Telegraph* reasoning to a summary judgment motion buttressed by a business judgment defense.[100] The Fifth Circuit noted that the district court, in granting summary judgment for the defendants, utilized a standard that required a determination of the dominant inference from circumstantial evidence.[101] The Fifth Circuit agreed that the initial "task of the district court on the motion for summary judgment was to examine the circumstances surrounding the parallel failures to deal alleged by Southway."[102] However, Judge Hill wrote that the district court's dominant inference analysis overstated the burden that the plaintiff must meet in order to survive a summary judgment motion under *Cities Service*.[103] According to the Fifth Circuit, language in *Cities Service*[104] that appears to weigh competing inferences is simply applying "a basic rule [of antitrust conspiracy law] that the inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of . . . independent business judgment."[105] Judge Hill stated that the *Cities Service* Court compared the probability of competing inferences before it examined "other evidence" that was intended by the plaintiff to show that the refusal to deal occurred under circumstances that would indicate a conspiracy.[106] Both *Southway* and *American Telephone & Telegraph* held that the Supreme Court applied an abstract standard of reasonableness to this evidence of "plus factors" that determined the probative value of the parallel refusal to deal.[107] Consequently, the

99. 672 F.2d 485 (5th Cir. 1982).

100. In *Southway*, a theatre owner brought an action against several competing theatre chains and national film distributors alleging a conspiracy to deprive the owner of opportunities to license first-run films. Defendants responded with a myriad of business justifications for the uniform conduct. *Id.* at 502-04.

101. *Id.* at 493.

102. *Id.* at 492.

103. *Id.* at 487.

104. First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 280 (1967).

105. Southway Theatres v. Georgia Theatre Co., 672 F.2d at 494.

106. *Id.*

107. *Id.*; American Tel. & Tel. Co. v. Delta Communications Corp., 590 F.2d 100, 102 (5th Cir.), *cert. denied*, 444 U.S. 926 (1979).

weighing of inferences created by these "plus factors" against inferences from evidence of business justification was impermissible.

This analysis suggests that a judge need only consider the reasonableness of the plaintiff's interdependence theory on a summary judgment motion. Accordingly, he or she is not required to consider a business judgment defense as a force that directly negates the probative value of a conspiratorial inference from conscious parallelism. Thus, a judge may disregard evidence of independent action or, at best, utilize such justifications obliquely when assessing the plausibility of the plaintiff's "plus factors."

Criticism of the Fifth Circuit Limitation

The Fifth Circuit limitation on the business judgment defense is untenable. First, the *Cities Service* opinion implicitly considered the "plus factors" of conscious parallelism in light of the defendant's business justification.[108] Evidence of conspiratorial motive, for example, was compared directly with the probability of good faith business judgment.[109] Furthermore, the "other evidence besides a simple failure to deal," which *Southway* analyzed[110] with a reasonableness standard, also seems to have been weighed, in *Cities Service*, against the defendant's business justifications.[111] In short, *Cities Service*'s language does not accord with the Fifth Circuit position. Additionally, numerous lower courts have interpreted both *Cities Service* and *Theatre Enterprises* to allow direct comparison of business justifications with evidence establishing the existence of "plus factors."[112] Several Fifth Circuit cases also seem to endorse this view.[113] Finally, the *Southway*

108. First Nat'l Bank v. Cities Serv. Co., 391 U.S. at 277, 280. *See supra* note 84 & accompanying text.

The *Southway* court's confusion may stem from a failure to distinguish between evidence of the ultimate fact of conspiracy and evidence establishing the "plus factors" necessary for an effective conscious parallelism theory. Circumstantial proof, apart from conscious parallelism, which is offered to establish the ultimate fact of conspiracy, is evaluated by giving the party opposing summary judgment the benefit of every reasonable inference from the evidence. However, many courts utilize a special standard of inference for conscious parallelism because "plus factors," by establishing an intermediate step to an inference of conspiracy, are a prerequisite to a permissible inference. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1176 (E.D. Pa 1981). Judge Hill seemed to characterize the evidence in *Southway* as evidence of the ultimate fact of conspiracy rather than evidence establishing a "plus factor." *See* Southway Theatres v. Georgia Theatre Co., 672 F.2d at 492-94.

109. First Nat'l Bank v. Cities Serv. Co., 391 U.S. at 277, 280.

110. Southway Theatres v. Georgia Theatre Co., 672 F.2d at 494.

111. First Nat'l Bank v. Cities Serv. Co., 391 U.S. at 277.

112. *See supra* notes 65-67 & accompanying text.

113. *See* Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017, 1027 n.27 (5th Cir. 1983) (interpreting *Cities Service*, the court stated that "the nature of the business relationship between plaintiff and defendants—whether competitors or not—may be considered in

and *American Telephone & Telegraph* reasoning undermines the basic tenet that independent action is sacrosanct under section 1 of the Sherman Act.[114] The Fifth Circuit effectively subjugates evidence of business justification by adopting a vague reasonableness standard to determine the probative force of parallel conduct. Defendant's business judgment defense should be directly applied against "plus factor" evidence without being obscured by an abstract standard of reasonableness that focuses on the plausibility of the plaintiff's theory.

The Better Standard

The existence of various overlapping,[115] underinclusive,[116] and contradictory[117] standards for evaluating conscious parallelism militates against the expeditious disposition of unsupported Sherman Act claims through summary judgment. Chief Judge Seitz's method of evaluating the probative significance of parallel business behavior provides the clearest and most comprehensive framework for inferential analysis.[118] This Third Circuit approach focuses on the two ancillary factors generally considered crucial to a conspiratorial inference: the existence of a motive for concerted action, and action that contradicts the defendant's economic self-interest.[119] The "plus factors," and other

determining whether it is more plausible to conclude either unilateral or collusive behavior"); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981) (in a summary judgment context, plaintiffs relying on a theory of conscious parallelism must establish that "defendants engaged in consciously parallel action . . . which was contrary to their economic self-interest so as not to amount to a good faith business judgment"); Aviation Specialities, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978). Arguably, the standard applied in *Pan-Islamic Trade* requires a weighing of "plus factor" evidence against evidence of independent action. The *Pan-Islamic Trade* court utilized the *American Telephone & Telegraph* abstract standard of reasonableness in ruling that plaintiff's asserted inference of conspiracy was impermissible given all the facts established in the record, including evidence of conscious parallelism. 632 F.2d at 558. However, Judge Anderson rejected Pan-Islamic's evidence of action contrary to defendants' economic self-interest as insufficiently probative rather than as abstractly unreasonable. *Id.* at 561-64.

114. *See supra* note 5 & accompanying text.

115. *Compare* Venzie Corp. v. United States Mineral Prod. Co., 521 F.2d 1309, 1314 (3d Cir. 1975) (plaintiff must prove action contrary to defendant's economic self-interest, and motivation to enter an agreement), *with* Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 559 (5th Cir. 1980), *cert. denied*, 454 U.S. 527 (1981) (plaintiff must prove defendant is engaged in consciously parallel action that was contrary to his economic self-interest so as not to amount to a good faith business judgment).

116. A standard that simply considers the defendant's actions in contradiction of economic self-interest, and not other potential "plus factors," may be underinclusive. *See* P. MARCUS, ANTITRUST LAW AND PRACTICE 198 n.2 (1980).

117. *See supra* notes 93-114 & accompanying text; *see also* Weit v. Continental Ill. Nat'l Bank & Trust Co., 641 F.2d 457, 462-63 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

118. *See supra* notes 57-64 & accompanying text.

119. *See supra* notes 61-64 & accompanying text.

circumstances surrounding parallel behavior that logically suggest illegal agreement, directly oppose evidence of independent action offered in the defendant's summary judgment motion. In addition, the Third Circuit approach implicitly recognizes that a jury would be forced to speculate[120] about the legal implications of conscious parallelism unless, on balance, an inference of conspiracy is more probable than an inference of independent action.[121] This formulation preserves the trial judge's latitude in assessing the business context of the suspect conduct while emphasizing the importance of business justifications in determining antitrust liability. Finally, the availability of extensive case law[122] applying Chief Judge Seitz's standard facilitates consistent application at the trial court level.

Conclusion

The pragmatic considerations of antitrust litigation demand a firm standard for consistent evaluation of the probative force of conscious parallelism on a summary judgment motion. Such a standard should affirm the significance of a defendant's assertion of good faith business justifications for parallel conduct. The Third Circuit's formulation emerges as the most desirable approach to this recurrent summary judgment issue. Conversely, the Fifth Circuit's limitation of the business judgment defense seems to defy Supreme Court precedent and basic Sherman Act doctrine. The Third Circuit's analysis provides a functional definition of anticompetitive agreement under the Sherman Act that other circuits should uniformly adopt in conscious parallelism cases.

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120. *See* Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 115 (3d Cir. 1980).

121. *See supra* note 44 & accompanying text.

122. *See generally* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1140-76 (E.D. Pa. 1981).

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